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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 71

PRESBYTERIAN CHURCH IN THE UNITED STATES
and J. LEHMON BRANTLEY, Chairman of the
Administrative Commission of the
Presbytery of Savannah,
Petitioners,

VS.

MARY ELIZABETH BLUE HULL MEMORIAL
PRESBYTERIAN CHURCH,
Respondent,

AND

PRESBYTERIAN CHURCH IN THE UNITED STATES
and J. LEHMON BRANTLEY, Chairman of
the Administrative Commission of
the Presbytery of Savannah,
Petitioners,

VS.

EASTERN HEIGHTS PRESBYTERIAN CHURCH and
FRANK L. PERRY, SR., JOHN BRUNING,
LESTER R. SARGENT, HARDIN
C. NORMAN and ARMIN S.
HUBERT, Trustees,
Respondents.

OPPOSING BRIEF OF RESPONDENTS

OWEN H. PAGE
305 Realty Building
Savannah, Georgia 31401
Counsel for Respondent Eastern Heights Presbyterian Church et al.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1380

PRESBYTERIAN CHURCH IN THE UNITED STATES and J. LEHMON BRANTLEY, Chairman of the Administrative Commission of the Presbytery of Savannah,
Petitioners,

VS.

MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH,
Respondent,

AND

PRESBYTERIAN CHURCH IN THE UNITED STATES and J. LEHMON BRANTLEY, Chairman of the Administrative Commission of the Presbytery of Savannah,
Petitioners,

VS.

EASTERN HEIGHTS PRESBYTERIAN CHURCH and FRANK L. PERRY, SR., JOHN BRUNING, LESTER R. SARGENT, HARDIN C. NORMAN and ARMIN S. HUBERT, Trustees,
Respondents.

OPPOSING BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

On April 17, 1966, the Eastern Heights Presbyterian Church (Respondent Church) by the unanimous action of its congregation voted to sever its relationship with the Savannah Presbytery and the Presbyterian Church in the United States. In its resolution, adopted that date, it charged the Petitioner church with certain fundamental and substantial departures from the faith, dogma, and discipline that existed at the time of its affiliation in 1930. Predominantly, the General Assembly of the Petitioner church was accused of advocating civil disobedience, counseling on the Viet Nam War, and engaging in other political activities —all in violation of the Westminster Confession of Faith and the Constitution of the Petitioner church.

The action of the Respondent church was within the freedom of religion clause of the First Amendment of the Constitution of the United States and did not violate the Constitution of the Petitioner church.

About a month after the Respondent church had disaffiliated, the Savannah Presbytery, a lesser judicatory of the Petitioner church, appointed an Administrative Commission. This commission adopted a resolution which threatened the peace and integrity of the Respondent church. Fearful of a trespass upon its church property[1] and interference with its church activities, the Respondents sought a permanent injunction in the Superior Court of Chatham County, Georgia. The Petitioners answered the Respondents' petition and sought the same equitable relief.

At the trial evidence was presented sustaining the charge of deviations brought against the Petitioner church. It was clear and concisive. It was not rebutted or refuted.

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1. Petitioners have no funds invested in any of the three properties owned by the Respondents (Record confirms).

The Book of Church Order and Confession of Faith, parts of the Petitioner church's Constitution which prohibit it from engaging in the activities charged, were introduced also. These constitutional inhibitions were the legal standards applied in determining whether or not the Petitioner church had transgressed its doctrine, dogma, and discipline. In determining the standard of departure that would be used in measuring the unconstitutional conduct of the General Assembly of the Petitioner church, the court charged on substantial departure.[2]

The trial court's verdict and judgment was for the Respondents. The Petitioners then appealed to the Supreme Court of Georgia. It affirmed the judgment of the lower court. The Petitioners' Motion for Rehearing was denied.

WHY CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari involves the verdict of a jury granting a permanent injunction restraining the Petitioners from trespassing upon the Respondents' property and interfering with the church activities enjoyed there. It fails to show that the judgment of the trial court, which was affirmed unanimously by the Supreme Court of Georgia, decided a federal question of substance not previously determined by this Court or was decided in a way probably not in accord with the applicable decisions of this Court.

The Petitioners' challenge of the right of the civil courts to assume jurisdiction of the issues and the collateral property rights is without merit. It fails even under the legal precedent which it urges upon this Court. In *Kedroff* v. *St.*

2. At page 6 of their petition, the Petitioners assert that the Respondents did not request that *Mack* v. *Kime*, 129 Ga. 1, 58 S. E. 184 be overruled. This is error as it applies to the standard of departure. Before both the trial court and the Supreme Court of Georgia the test of "substantial" rather than "complete" was urged.

Nicholas Cathedral, 344 U. S. 100, 120, 121 (1952), Mr. Justice Reid declared the rule that the federal courts would follow:

> "There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property."

The decision of the Supreme Court of Georgia, which is the subject of the petition, affects the substantive law of the State of Georgia. The determination of the issue, whether or not the supreme judicatory of a church has violated the implied trust by the transgression of its dogma, doctrine, or discipline, has been previously decided by numerous courts, state and federal. These decisions span the ensuing years since *Watson* v. *Jones*, 80 (13 Wall.) 679 (1871).

No new issue is presented in this petition. It has been a recognized province of the state that its courts where property rights are involved have the jurisdiction to resolve the issues concerning departure and as a concomitant vest the control of property in those, faction or church, who adhere to the existing doctrine, dogma, and faith. Consonant with this thesis, the Supreme Court of Georgia affirmed the judgment of the lower court. Succinctly, it found that the Petitioners through its highest judicatory, the General Assembly, had substantially and fundamentally departed from its doctrine, dogma, and faith as established by its constitution. This, then, is the sole issue presented.

To charge that the decision of the Supreme Court of Georgia violates the First Amendment or any federal decision applying the same is unjustified. The decision in no way restrains the free exercise of religion or affects the establishment thereof. The denial of the petition will leave all parties exactly where they were on April 17, 1966, when the Respondents chose by resolution, unanimously adopted

by the congregation,[3] to disaffiliate from the Petitioner church. The Petitioner church unrestrained may, if it wishes, continue its disregard of the constitutional restraints which were the basis of the Respondents' action. It may continue to believe and act as it wishes.

Past history demonstrates the disinclination of this Court to extend *Kedroff* where the courts have utilized the implied trust or related doctrines. See *Romanian Orthodox Missionary Episcopate* v. *Trutza*, 205 F. 2d 107 (6th Cir.), cert. denied, 346 U. S. 915 (1953); *Whipple* v. *Fehsenfeld*, 173 Kan. 427, 249 P. 2d 638, cert. den. 74 S. Ct. 23, reh. den. 74 S. Ct. 271, 344 U. S. at 115, and *Katz* v. *Singerman*, 241 La. 103, 127 So. 2d 515, cert. denied October 23, 1961, 368 U. S. 15.

Further, the petition for certiorari should be denied because the Petitioners failed to timely and properly raise the federal questions on which they base their petition with the specification required in the trial court by their pleadings, requests for charge, and specifications and in the Supreme Court of Georgia in their Enumeration of Errors. The record will show, and this is confirmed by the Petitioners' brief, that the federal questions were raised for the first time on their Motion for a Rehearing to the Supreme Court of Georgia, after its initial decision. Too, it will reflect that the decision of that court in denying the motion did not entertain the federal questions presented and make any determination of them. Finally, the Writ of Certiorari should be denied because it is not affirmatively shown that federal questions were presented timely to the Supreme Court of Georgia and that its decision determined a federal question.

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3. The vote was 122 to 0 (Record confirms).

THE PETITIONERS FAILED TO PROPERLY OR TIMELY RAISE THE CONSTITUTIONAL QUESTIONS WHICH WOULD GIVE THIS COURT JURISDICTION

The Motion for Rehearing filed by the Petitioners in the Supreme Court of Georgia did not properly or timely raise a federal question. Therefore, no federal question was ruled upon by the Supreme Court of Georgia, and the Petitioners' petition for a Writ of Certiorari is defective.

The Petitioners' petition for certiorari fails under their authority; *Herndon* v. *Georgia*, 295 U. S. 441 (1935). To give this Court jurisdiction the Petitioners must show: (1) the proceedings meet the test of particularity and specification required; (2) the federal questions presented, for the first time, in the Motion for a Rehearing, were decided in denying the motion.

The petition fails under each of the above tests. Paragraph 16 of the Petitioners' answer to the Respondents' action alleges that the Respondents appropriated the church property in violation of the laws of the United States of America. This is the only allegation presenting a federal issue raised by the Petitioners' pleading. No violation of any federal amendment was identified or specified. At the trial no requests for charge raised violations of the First or Fourteenth Amendments.[4]

Only on the Motion for a Rehearing; after the decision of the Supreme Court of Georgia, were any federal questions presented. The decision of the Supreme Court of

4. The record and petition filed by the Petitioners irrefutably established the absence of any federal question properly and timely raised. Contention that such questions were raised in their brief to the Supreme Court of Georgia is insufficient under Paragraph 1, subsection (f) of Rule 23 of the Supreme Court rules.

Georgia denying the Motion for a Rehearing was silent on any federal issue raised.[5]

The Petitioners were alerted and had every reason to anticipate that *Mack* v. *Kime,* 129 Ga. 1, 58 S. E. 184 (1907) would be changed as to the standard of departure declared in that decision.[6] Fatal affirmation of this is found in the Petitioners' Enumeration of Errors. The fifth error asserted that the Court erred in charging on "substantial abandonment" rather than "absolute abandoment". The Respondents sought the affirmation of this charge in their brief to the Supreme Court of Georgia requesting the approval of the judgment of the trial court.

The Petitioners' reliance upon the doctrine of *stare decisis* stated in the Georgia Annotated Code 6-161 is without merit. As previously commented upon, the Respondents in argument before the trial court and in their brief to the Supreme Court of Georgia requested that the complete test of *Mack,* supra be rejected and new standard of departure (substantial) be adopted. The assertion of the Petitioners to the contrary reflects an indifference to the history of the case.

The sole basis for the injection of a federal question is the Petitioners' contention that the Supreme Court of Georgia overruled in toto, *Mack,* supra, and as a consequence rejected *Watson* v. *Jones,* 80 (13 Wall.) 679 (1871). Such is not the case, and voluble insistence can not make it otherwise.

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5. For comparable language to that used by the Supreme Court of Georgia in denying the Petitioners' Motion for a Rehearing and where this Court dismissed the Writ of Error see *Consolidated Turnpike Co.* v. *Norfolk & O. V. R. Co.,* 228 U. S. 326, 333, 334 (1913). The highest State court's language denying the motion was:

> "The court having maturely considered the petition aforesaid, the same is denied."

6. Petitioners would not have been denied due process if not alerted. *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444 (1924).

Mack, supra, was not overruled completely. It was overruled to the extent, and to the extent only, that it changed the standard of determining transgressions by the supreme church judicatory from "absolute" to "substantial."

Mack, supra had not adopted this Court's interpretation of the First and Fourteenth Amendments to the Constitution. It is recognized that *Watson*, supra, was a decision of the federal common law under the philosophy expressed in the First Amendment. At the time of the Mack, supra, (1907) decision, this Court had not extended the First Amendment to the states by invoking the Fourteenth Amendment.

For this Court to review the decision of the Supreme Court of Georgia, it is mandatory upon the Petitioners that they show not only that a federal question was timely presented, but that the decision of the Supreme Court of Georgia rested upon the application of the First and Fourteenth Amendments. Patently, the Supreme Court of Georgia grounded its decision in a change of the substantive law of the State. The surmise on the part of the Petitioners that the decision rested upon the application of the First and Fourteenth Amendments is not sufficient to give this Court jurisdiction.

In *Lynch* v. *New York, Ex Rel. Pierson*, 293 U. S. 52, 54 (1934) Mr. Chief Justice Hughes precisely declineated the test:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of a federal question was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

He concluded:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of the two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain, this Court will not take jurisdiction."

The Supreme Court of Georgia in the decision complained of rested its determination in a change of the substantive law of the State. This decision unrelated to a federal question is sufficient to remove it from the jurisdiction of this Court.

The mere fact that the decision of the highest State court may be erroneous on a question of State law, or has overruled principles or doctrines established by previous decisions on which the Petitioners have relied, does not give rise to claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.[7]

Petitioners had every opportunity to invoke the First and Fourteenth Amendments from answer to appeal. They did not.

WATSON V. JONES, 80 (13 WALL.) 679 (1871), IS NOT VIOLATED WHERE THE HIGHEST CHURCH JUDICATORY HAS TRANSGRESSED ITS CONSTITUTION

The implied trust theory, which was applied by the Supreme Court of Georgia, assumes that the actions of the supreme judicatory of a representative church are valid unless plainly ultra vires, collusive, or arbitrary. Under the implied trust, where property rights are involved, the question of deviations from faith and dogma may be thrust upon the civil court. The court then will have to decide

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7. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673 (1930).

whether the deviations charged are so fundamental that they could not be changed, or there has been a fundamental change improperly made. This projects the issue of whether a representative church can claim the protection of the First Amendment to the Constitution if its actions are made without the framework of its own constitution. In applying the implied trust, the Supreme Court of Georgia held that the civil courts will in a proper case prevent the diversion of church property from the doctrine or purpose to which it was originally devoted.

Where a property right between the local congregation and a representative church rests upon the conduct of the highest church tribunal, the civil court has the responsibility to determine if the church authority acted within its constitution. It is not required to blindly follow or accept the legal formula pronounced in *Watson* v. *Jones*, supra, where it is proven that the representative church has departed from the faith and dogma that existed at the time of the affiliation of the local church.

The rigid formula promulgated in *Watson* v. *Jones*, supra, losts its inflexibility in the succeeding years. The most recent case which has tested its rigidity is *Romanian Orthodox Missionary Episcopate* v. *Trutza*, 205 F. 107, (1953). The facts are reminiscent of those contained in *Kedroff*. The spectre of the domination of the church by a Communist government resulted in a church property conflict between the alleged bishop appointed by a submissive Romanian Patriarch and the local Episcopate. In finding for the Episcopate, the Sixth Circuit Court of Appeals found that the Episcopate had the authority to revoke its affiliation with the Romanian Patriarch and Holy Synod of Romania because of the dictation of ecclesiastical appointments by the Communist controlled government. The court observed:

"We also think that this conclusion is in accord with the spirit if not the letter of the *Kedroff* case, which declares that freedom to select the clergy, where no improper methods of choice are proven. . ."

Once again *Watson* as it pertains to the representative type of church government was modified. The decision of the Sixth Circuit Court of Appeals considered the propriety or impropriety of the methods of functioning on the highest church level. If the methods of the highest church judicatory or its equivalent are proven to have been improper, the court may look beyond the rule formulated in *Watson*.

The questioning of the unlimited power of the highest church judicatory began with *Bouldin* v. *Alexander*, 82 (15 Wall.) U. S. 131 (1872). With *Bouldin* the courts began to demand from the church tribunals adherence to basic concepts of equity. By implication *Bouldin* established that the court would only defer to a church tribunal which had followed its own procedural rules. This Court said:

"In a congregational church the majority, if they adhere to the organization and doctrines, represent the church."[8]

In *Brundage* v. *Deardroff*, 55 F. 839 (1893), which involved a dispute between two factions of the church of the United Brethren of Christ, a national hierarchical church, Judge Taft stated at pages 847-848:

"We do not understand the supreme court, in *Watson* v. *Jones*, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts. Certainly the effect of *Watson* v. *Jones* cannot be extended beyond the principle that a bona fide decision of the fundamental law of the church must be recognized as conclusive by civil courts. Clearly, it was not the intention

8. Id. at 140.

of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights of a minority seeking to maintain the integrity of the original compact."

The impact of *Watson* was further minimized by *Gonzalez* v. *Archbishop*, 280 U. S. 1 (1929). Mr. Justice Brandeis observed at page 16:

> "In absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."

The modification of *Watson* by the federal judiciary continued with *Sims* v. *Greene*, 160 F. 2d 512 (1947). In determining the procedural validity of the removal of a contesting bishop, the Third Circuit Court of Appeals in applying the law of the forum, the State of Pennsylvania, quoted from the opinion of Mr. Justice Williams of the Supreme Court of Pennsylvania in *Kreker* v. *Shirey*, 163 Pa. 534, 30 A. 440 (1894):

> "The power of a civil court, as distinguished from that of an ecclesiastical tribunal, in respect to disputes between warring church factions is limited to an ascertainment of the pertinent church law, to inquire as to whether or not the law has been conformed with by the churchly tribunal or judicatory, and to the enforcement of the judgment or order of the religious tribunals or judicatory if the order or judgment of the tribunal or judicatory of the church has been reached in accordance with the law of the church."

The adoption of the law of Pennsylvania by the Third Circuit Court of Appeals brings the procedural test projected by Judge Taft and Mr. Justice Brandeis into precise focus. No longer were the federal courts bound by the formula of *Watson* v. *Jones*, supra.

The Supreme Court of Georgia has affirmed the proposition that judicial abstention is not absolute even in the internal affairs of a religious association. The courts will assume jurisdiction to decline the enforcement of a decision of an ecclesiastical tribunal where to enforce such decision would be offensive to the peace and good order of society, would approve an arbitrary or ultra vires act, or would be repugnant to the principle of equity.

THE DECISION OF THE SUPREME COURT OF GEORGIA IS NOT CONTRARY TO MACK V. KIME, 129 GA. 1, 58 S. E. 184 (1907) AND WATSON V. JONES, 80 (13 WALL.) 679 (1871)

The Petitioners in their petition categorically declare that the decision of the Supreme Court of Georgia reversed *Watson* v. *Jones*, supra, and *Mack* v. *Kime*, supra. This it did not do. At pages 69 and 70 of the decision[9] complained of by the Petitioners, the court stated:

> "The *Mack* case, in discussing the degree of abandonment or departure necessary to obtain protection, uses terminology such as 'complete abandonment,' 'purposes utterly foreign,' 'entirely abandon,' 'utterly abandon,' and 'abandon altogether.' We disagree. We do not believe that 'complete' or like degree of abandonment or departure is necessary for relief. To the extent that *Mack v. Kime*, supra, requires such standard it is expressly overruled."

Obviously, the Supreme Court of Georgia overruled *Mack* as to its standard of "complete"[10] only. The charge

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9. 159 S. E. 2d 690, 696.

10. ". . . but where, in a given case, the facts are such that there can be no question that there has been a complete abandonment, and, as a result, the property will be diverted to purposes never contemplated by the original organization, the civil courts will interfere at the instance of those who adhere to the teachings of the original association." *Mack* v. *Kime*, 129 Ga. 1, 22, 58 S. E. 184.

by the Petitioners that this constituted a total reversal of *Mack* and thereby of *Watson* is baseless.

If the Supreme Court of Georgia in 1907 (the year *Mack* was decided), by adopting *Watson* could establish the complete test without violating *Watson*, it must follow that the modification of a standard from complete to fundamental does not constitute a violation of *Watson*. It is axiomatic that the modification of a standard does not result in the total rejection of the case.

The Petitioners rely upon *Stewart* v. *Jarriel et al.*, 206 Ga. 855, 59 S. E. 2d 368 (1950) as authority for the refusal of courts of equity to interfere in the internal affairs of a religious organization involving questions of faith, practice, and law. Unfortunately, the complete holding was not cited. Mr. Justice Hawkins, who authored the opinion, imposed the following qualification upon the unlimited authority of an ecclesiastical body:

> "So long as a professed creed is not subversive of the peace and good order of society, it is not within the province of any department of the government to settle differences in creeds or determine what ought or ought not to be a fundamental of religious belief."

In view of this language from *Stewart*, can it be said that the decision complained of by the Petitioners was the one that first questioned the complete test of *Mack*? It is submitted that *Stewart* constituted the first erosion of the complete standard enunciated in *Mack*. Unquestionably, it was a determining factor in the decision of the Supreme Court of Georgia which overruled *Mack* as to the standard of departure. Parenthetically, in considering the language from *Stewart* and its application to the decision complained of by the Petitioners, what is more subversive of peace and good order than to advocate "man is above the law". This

the Petitioner church did at its General Convention of 1965 and 1966.[11]

THE CIVIL COURTS OF THE STATE OF GEORGIA, UPON A PROPER SHOWING, HAVE THE AUTHORITY TO PREVENT THE DIVERSION OF CHURCH PROPERTY FROM THE DOCTRINE OR PURPOSE TO WHICH IT WAS ORIGINALLY DEVOTED

The Supreme Court of Georgia in affirming the judgment of the trial court recognized the traditional philosophy of freedom of religion with its compatible doctrine of separation of church and state. It acknowledged the Petitioner church's immunity from having its doctrine or dogma of a church defined, interpreted, or censored by the civil courts. However, it rightfully invoked the legal responsibility imposed under Section 22-408 of the Georgia Annotated Code which provides:

> "Courts are reluctant to interpose in questions affecting the management of the temporalities of a church; but when property is devoted to a specific doctrine or purpose, the Courts will prevent it from being diverted from the trust."

In the construction of this statute the Supreme Court of Georgia acknowledged the representative governmental structure of the Petitioner church and concluded that there was an implied trust upon local church properties for the benefit of the general church. The imposition of the implied trust was compatible with *Watson* v. *Jones*, supra. The Supreme Court of Georgia then enforced the bilateral responsibility of the implied trust which flows not only from the local church to the supreme judicatory but also in the reverse. The court found:

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11. The record will show that the Respondents severed their relationship following the 1965 general convention and before the 1966 convention at which the Petitioners' position on civil disobedience was reaffirmed.

"We take the view that such a trust is conditioned upon the general church's adherence to its tenets of faith and practice existing when the local church affiliated with it and that an abandonment of, or departure from, such tenets is a diversion from the trust, which the civil courts will prevent."

The finding of the Supreme Court of Georgia that it could, in a proper case, take jurisdiction where the denominational church by its actions have effected a diversion of local church property from the implied trust is not without precedent and authority in other jurisdictions, both state and federal.

THE DECISION OF THE SUPREME COURT OF GEORGIA WILL NOT PERMIT ANY CHURCH MEMBER TO TAKE HIS GRIEVANCE TO A COURT OF LAW

The Petitioners in section 4 of their petition entitled, "Reasons for Granting the Writ" make the emotional plea that if the decision of the Supreme Court of Georgia is sustained, that it poses a threat to the continued existence of representative churches. If this were a valid plea, the strength of the representative churches would have been enfeebled many years ago. The decision of the Supreme Court of Georgia that is complained of by the Petitioner is not the first. An examination of the case law, both state and federal, since 1871 will show a multitude of litigation involving representative church governments in which the issue of departures and violations were considered. History will attest that from the genesis of the Petitioner church in 1861 until today it has flourished.[12] Its growth has been equaled by other representative denominations such as Lutheran, Methodist, and Episcopal. Yet, during these years

12. Alexis de Tocqueville, *Democracy in America*, "There is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America; . . . They (clergy) keep aloof from parties and from public affairs."

churches and factions have gone to court raising the questions of dogma and doctrine and the collateral property rights.[13] None of these connectional churches have suffered.

Rather than having a debilitating result upon the Petitioner church and others in the representative class, action by this Court affirming the decision of the Supreme Court of Georgia, will have an invigorating and chastening effect. An affirmation will require the highest church courts to adhere, and strictly so, to the faith and dogma as declared in their constitutions and confessions. Equally, it will remind them that changes in faith and dogma must be preceded by the proper amendments to their laws.

If the Petitioner church in good faith wished to become embroiled in civil disobedience and other political activities, it could, as provided for in its constitution, have amended the Book of Church Order and Confession of Faith removing the inhibitions. This it did not do.

To remove the constitutional restraints, amendments to the Book of Church Order and Confession of Faith were necessary. Procedurally, this would require the submission of amendments to the presbyteries for their advice and consent (a majority is required to amend the Book of Church Order and three-fourths to amend the Confession of Faith).

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13. *Bouldin* v. *Alexander*, 82 (15 Wall.) U. S. (1872); *Brundage* v. *Deardroff*, 55 F. 839 (1893); *Gonzalez* v. *Archbishop*, 280 U. S. 1 (1929); *First English Lutheran Church* v. *Evangelical Lutheran Synod*, 135 F. 2d 701 (1943); *Romanian Orthodox Missionary Episcopate* v. *Trutza*, 205 F. 2d 107 (1953).

Bear v. *Heasley*, 98 Mich. 297, 57 M. W. 270 (1893); *Horsman* v. *Allen*, 129 Cal. 131, 61 Pac. 798 (1900); *McNeilly* v. *First Presbyterian Church in Brookline*, 243 Mass. 331, 137 N. E. 691 (1923); *Kreker* v. *Shirey*, 163 Pa. 534, 30 A. 440 (1894); *Kicinko* v. *Petruska*, 102 A. 286 (Pa. 1917); *Trustees of Pencader Presbyterian Church in Pencader* v. *Gibson*, 22 A. 2d 782 (Del. 1941); *Stewart* v. *Jarriel*, 206 Ga. 855, 59 S. E. 2d 368 (1950); *Church of God of Markleysburg* v. *Church of God at Markleysburg*, 50 A. 2d 357 (Pa. 1947).

The actions of the presbyteries would then have to be considered by the General Assembly.[14]

What the Petitioner church rejected was meticulously followed by the Cumberland Presbyterian Church in *Mack* v. *Kime*, supra.

THE WALL OF SEPARATION IS NOT SO IMPREGNABLE THAT A DENOMINATIONAL CHURCH IS NOT SUBJECT TO REASONABLE RESTRAINTS UPON THE LIBERTIES GUARANTEED BY THE FIRST AMENDMENT

> "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. ! ."

Chancellor Johnson, *Harmon* v. *Dreher*, 17 S. C. eq. 87, 120 (1843) S. C. Quoted by Mr. Justice Miller in *Watson* v. *Jones*, supra.

> "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

Abington School District v. *Schempp*, 374 U. S. 203 (1963). Quoted by Mr. Justice Brennan from *Reynolds v. United States*, 98 U. S. 145, 166, 167 (1878).

Assuming that the decision of the Supreme Court of Georgia, impinged upon the First Amendment, which is denied, does the immunity granted by it insulate the Petitioner church from the limitations expressed in the above

14. Book of Church Order, Ch. XXX, Par. 1-2.

quotations? In finding that the Petitioner church had violated its Confession of Faith and Book of Church Order,[15] the Supreme Court of Georgia appropriately asserted:

> "The General Assembly's endorsement of civil disobedience, which would allow a citizen to decide whether or not he will obey the law, is a radical venture into civil affairs. It is absolute defiance of law and order and is the road to anarchy."[16]

What provoked this accusatory prophecy? The pronouncements made by the General Assembly of the Petitioner, the highest church judicatory, at its General Convention of 1965 and 1966:

> "Yet, when due course of civil law is denied or abridged, the Christian, for whom 'God alone is Lord of Conscience,' may validly appeal to the Higher Law, led by the inner witness of the Holy Spirit, speaking in and through the scriptures. This great ordering Word may lead him against the world, against the establishment of the civil magistrates. But he should be very cautious about taking such a lonely position and should hold it only in fear and trembling. If it leads him into civil disobedience, he should not try to justify his position before men. He has violated the law, the public

15. "Synods and councils are to handle or conclude nothing but that which is ecclesiastical; and are not to intermeddle with civil affairs which concern the commonwealth unless by way of humble petition in cases extraordinary; or by way of advice by the civil magistrate," (Ch. XXXIII, par. 4).

"It is the duty of the people to pray for magistrates, to honor their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority, for conscience' sake. Infidelity, or difference in religion, doth not make void the magistrate's just and legal authority, nor free the people from their due obedience to him; from which ecclesiastical persons are not exempted . . ." (Ch. XXV, par. 4).

"The power which Christ has given his Church is wholly moral and spiritual, and constitutes the Church a kingdom and government distinct from the civil commonwealth. . . ." (Ch. I, ¶ 1-2).

16. 224 Ga. 61, 77, 159 S. E. 2d 690, 700.

standard of justice, and hence must recognize his liability to the judgment of the civil court." (1965)

"(3) To regard civil disobedience as a measure of last resort to be employed only in circumstances of otherwise irremediable deed, and in the exercise of which the whole concept of law is not denied, but affirmed; and (4) To continue to support and regard with compassion those who practice civil disobedience when no legal recourse has been left open to them and who act in Christian conscience and allegiance to Almighty God." (1966)

In *Abington School District*, Mr. Justice Brennen formulated his own trichotomy in which he classified religious questions involving the First Amendment. Clearly, under the actions of the General Assembly of the Petitioner, the third principle is the one that should be invoked by this Court. Mr. Justice Brennen quoted approvingly from *Davis* v. *Beason*, 133 U. S. 333 (1890):

"It was never intended or supposed that the amendment (First) could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."

See also *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1 (1890); *Cantwell* v. *State of Connecticut*, 310 U. S. 296 (1940); and *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

More recently this Court has reiterated its disapproval of conduct inimical to the peace and good order of society. In reversing the Supreme Court of Louisiana in *Cox* v. *Louisiana*, 379 U. S. 559 (1965), Mr. Justice Goldberg, speaking for the majority, stated at page 574:

"Liberty can only be exercised in a system of law which safeguards order. . . We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty

> under the law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations."

What was expressed by Mr. Justice Goldberg in *Cox* was vigorously supported by Mr. Justice Black in his dissenting opinion in *Brown* v. *Louisiana*, 383 U. S. 131 (1966). At page 168 he declared:

> "Governments like ours were formed to substitute the rule of law for the rule of force. . . . But I say once more that the crowd moved by noble ideals today, can become the mob ruled by hate and passion and greed and violence tomorrow. The holding in this case today, makes it more necessary than ever that we stop and look more closely at where we are going."

The stern expressions of this Court firmly positioning itself on civil disobedience affirms the conceptual analysis of Mr. Justice Roberts in *Cantwell* v. *State of Connecticut*, supra. At pages 303 and 304, he stated:

> "Thus the amendment (First) embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second can not be. Conduct remains subject to regulation for the protection of society."

It is the second concept which is before this Court. It is here because of the conduct of the highest judicatory of the Petitioner church.

Can it now raise the wall of separation of church and state which it breached by its actions? By the sword of political involvement, it has jeopardized the security of our nation, but when charged with the indictment of advocating lawlessness, it seeks to raise the shield of separation. The

authors of the First Amendent did not envisage a church immune from abiding by the lawful ordinances imposed by the civil magistrate.

If the restraint of the law is removed from ecclesiastical institutions, a fatal thrust will have been made into the heart of the philosophy of government as conceived by our forefathers. For surely, as feared, ours will become a government of men, and not of laws. The anarchy prophesied by the Supreme Court of Georgia will be followed by tyranny. History affirms.

The condemnation of this Court by civil disobedience was recently underscored in a speech by the Honorable Erwin N. Griswold, the Solicitor General of the United States. Speaking at Tulane University Law School, he charged:

> "I believe the current rhetoric—which sometimes seems to consecrate 'civil disobedience' as the noblest response in the pantheon of virtues—has obscured the nature and consequence of this activity. To define my term—I mean by 'civil disobedience' the deliberate violation of a rule ordained by constituted government because of a conscientious conviction that the law is so unjust that it cannot morally be observed by the individual. . ."

THE PRONOUNCEMENTS OF THE GENERAL ASSEMBLY OF THE PETITIONER CHURCH ON CIVIL DISOBEDIENCE WERE VIOLATIONS OF THE CHURCH'S CONSTITUTION

The Petitioners in evaluating the significance of the pronouncements made by the General Assembly of the Petitioner church in 1965 and 1966 concerning civil disobedience ignored the authority of the General Assembly. It is the voice. The lesser tribunals are committed in policy and position by it. Departures occur when this omnipotent voice speaks. This was the thesis upon which *Watson* v.

Jones, supra, was decided. The power vested in the General Assembly has been affirmed in *St. John's Presbytery* v. *Central Presbyterian Church of St. Petersburg*, 102 So. 2d 114 (Fla. 1940)

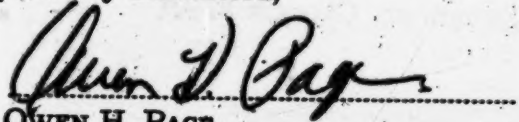
It must follow then that the actions of the General Assembly in 1965 and 1966 are not simple statements of "points of view" though the Petitioners may wish them in that harmless category. They constitute conscious violations of the Confession of Faith and Book of Church Order of the Petitioner church.

> "The church can not redeem society by political action; when evangelism becomes politics, it is no longer the Gospel of Christ's Kingdom."[17]

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,



OWEN H. PAGE
Counsel for Respondent Eastern Heights Presbyterian Church et al.

17. *Christianity Today*, April 28, 1967.

CERTIFICATE OF SERVICE

This is to certify that I have this day served Mr. Frank S. Cheatham, Jr., 32 East Bay Street, Savannah, Georgia 31401, and Mr. Charles L. Gowan, 434 Trust Company of Georgia Building, Atlanta, Georgia 30303, attorneys for the Petitioners, in the foregoing matter with a copy of this brief by depositing in the United States mail a copy of the same in a properly addressed envelope with adequate postage thereon.

This 25 day of May, 1968.

Owen H. Page

OWEN H. PAGE
Attorney for Respondents Eastern Heights Presbyterian Church et al.

305 Realty Building
Savannah, Georgia 31401